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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [redacted] 72

HENRY J. BEAL, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, ET AL.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

WALTER R. JOHNSON,
Attorney General
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

MAY IT PLEASE THE COURT:

The petition of Henry J. Beal, County Attorney of Douglas County, Nebraska, and others, whose names are subscribed hereto, and their successors in office, appearing by the Attorney General of the State of Nebraska, respectfully show to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

The respondent, Missouri Pacific Railroad Corporation in Nebraska, filed its Bill in Equity in the District Court of the United States for the District of Nebraska, Omaha Division, to enjoin the Attorney General of the State of

Nebraska, and certain other law enforcement officers acting under his advice and direction, from bringing criminal proceedings to enforce the Nebraska Full Train Crew Law.*1 It was alleged that the Attorney General was proceeding under a purposeful, arbitrary, wrongful and unlawful construction and administration of said statute, and would cause property damage to the railroad, particularly because of the heavy penalties*2 which were unlawfully threatened to be attempted to be imposed.

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*1 Section 74-519 Compiled Statutes of Nebraska for 1929, is as follows:

> "It shall be unlawful for any railroad company doing business in the State of Nebraska to operate or run over its road or any part thereof, or suffer or permit to be run over its road or any part thereof, outside of the yard limits, any passenger, mail or express train carrying passengers, whose regular equipment consists of more than five cars, with a crew, consisting of less than one engineer, one fireman, one conductor, one brakeman and one flagman; and further provided, passenger trains whose regular equipment consists of five cars or less, may be operated with a crew consisting of one engineer, one fireman, one conductor and one brakeman or flagman."

*2 Penalties for violation of Section 74-519 Compiled Statutes of Nebraska for 1929, are contained in Section 74-522, Compiled Statutes of Nebraska for 1929, which is as follows:

> "The officers or agents of any railroad company doing business in the State of Nebraska, who shall send out on its road, or cause or suffer or permit to be sent out on its road, or any part thereof, outside of the yard limits, any passenger or freight train which is not manned in accordance with the provisions of this article shall be guilty of a misdemeanor, and upon conviction

The defendants, who are the petitioners herein, in their answer:

"Deny that the defendants under a (purposefully), arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take other steps to impose upon plaintiff, or upon interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

Defendants aver * * * that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

(fol. 35) The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by

---

thereof shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense and shall stand committed until such fine and costs are paid, and any railroad company in the State of Nebraska whose officer or officers, agent or agents or any servant or servants shall be found guilty of such misdemeanor, shall be liable for any damage caused by the violation of the provisions of this article."

means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had." (Record pp. 25-26.)

The federal District Court entered judgment on the pleadings and without evidence, and granted the injunctive relief demanded. (Record pp. 28-29.)

On appeal the Circuit Court of Appeals, Eighth Circuit, affirmed the decree appealed from, but without considering the question of equity jurisdiction under the facts as disclosed by the pleadings. (Record pp. 39-48.)

The failure of the Circuit Court of Appeals to consider the matter of equity jurisdiction was specifically challenged to its attention in a petition for rehearing (Record pp. 49-58), which was denied. (Record p. 59.)

B

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

It is the contention of the petitioners that the injunction allowed by the federal District Court entirely lacked *factual basis;* that the Court was wholly without jurisdiction in equity to enter same; that the action of the United States Circuit Court of Appeals for the Eighth Circuit, in failing to recognize this question, and its further refusal to consider the question when directly presented on a petition for rehearing, evidences that the said Circuit Court of Ap-

peals (1) has decided an important question of general law in a way untenable and in conflict with the weight of authority; (2) has decided a federal question (i. e., equity jurisdiction of the federal District Court) in a way in conflict with applicable decisions of this court; and (3) has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court from which the appeal was taken, as to call for an exercise of this Court's power of supervision. (Rules 38, 5, b.)

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and of proceedings in the case numbered and entitled on its docket, No. 11,465 - Civil - Henry J. Beal, County Attorney of Douglas County, Nebraska, et al., Appellants, v. Missouri Pacific Railroad Corporation in Nebraska, Appellee, and that the said Decree of the United States District Court for the District of Nebraska, Omaha Division, may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

Henry J. Beal, County Attorney of Douglas County, Nebraska, M. L. Endres, State Sheriff of Nebraska, John J. Pszanowski, Chief of Police of the City of Omaha, Nebraska, Charles B. McDonald, Sheriff of Douglas County, Nebraska, Harry Mundell, Sheriff of Sarpy County, Ed W. Phingan, Sheriff of Cass County, Carl Ryder, Sheriff of Otoe County, J. C. Broady,

Sheriff of Nemaha County, Lewis W. Davies, Sheriff of Richardson County, and C. A. Sorensen, Attorney General of Nebraska, Charles A. Randall, John J. Miller and Hugh Drake, Members of the Nebraska State Railway Commission of the State of Nebraska, and their successors in office, Petitioners.

By Walter R. Johnson
Attorney General
H. Emerson Kokjer
Assistant Attorney General
Edwin Vail
Assistant Attorney General
Their Attorneys.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. ____

HENRY J. BEAL, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, ET AL.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD CORPORATION IN NEBRASKA,

Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS IN THE COURT BELOW

Opinion of District Court on overruling of motion to dismiss, filed June 30, 1936 (Record, p. 16), not reported, should be considered in connection with the decree of the District Court allowing injunction dated December 2, 1938. (Record p. 28.)

Opinion of the Circuit Court of Appeals, Eighth Circuit, was filed January 18, 1940, and appears at pages 39-47 of the Record. It is reported in 108 Fed. (2d) 897, (adv. sheets).

JURISDICTION

Decree of United States Circuit Court of Appeals, Eighth Circuit, was entered in conformity with its opinion, on January 18, 1940. Petition for rehearing challenging the at-

tention of that Court to the exact question here presented, was filed February 1, 1940 (Record pp. 49-58). An order was entered by the Circuit Court of Appeals denying the petition for rehearing on February 12, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. at L. 938; Tit. 28, sec. 347 U. S. C. A.).

STATEMENT OF THE CASE

The Missouri Pacific Railroad Corporation in Nebraska, a Delaware Corporation, brought this action in the United States District Court for the District of Nebraska, Omaha Division, against the petitioners who include the Attorney General of the State of Nebraska and certain other law enforcement officers who act under his advice and direction, to enjoin them from bringing criminal proceedings to enforce the Nebraska Full Train Crew Law. The law in question is Section 74-519, Compiled Statutes of Nebraska for 1929, and is set out in a foot-note in the petition (ante p. 2). The section of the statute providing penalties for violation is also set out in a foot-note in the petition (ante p. 2).

It will not be necessary to discuss the provisions of said law, nor the supposed misinterpretation of the law under which the respondent alleged that the Attorney General and the law enforcement officers acting under him were threatening to proceed. It is sufficient here to point out that injunctive relief was sought to restrain the law enforcement officers from bringing criminal prosecutions under said statute which it was alleged would occasion property damage to the railroad, particularly because of heavy and excessive penalties provided by statute for daily violations of the act which it was alleged that the law enforcement officers were threatening to attempt to impose.

The Attorney General and the other law enforcement officers, who act under his advice and direction, answered traversing all allegations of property damage, and in the answer specifically:

"Deny that the defendants under a (purposefully), arbitrary, wrongful, and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take other steps to impose upon plaintiff, or upon interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

Defendants aver * * * that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

(fol. 35) The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of

the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had." (Record pp. 25-26.)

The federal District Court entered judgment on the pleadings and without evidence and granted the injunctive relief demanded. (Record pp. 28 and 29.) On appeal the Circuit Court of Appeals, Eighth Circuit, affirmed the decree appealed from but without considering the question of equity jurisdiction under the facts disclosed by the pleadings. (Record pp. 39-48.)

The failure of the Circuit Court of Appeals to consider the matter of equity jurisdiction was specifically challenged to its attention in a petition for rehearing (Record pp. 49-58), which was denied. (Record p. 59.)

SPECIFICATION OF ERRORS

The Court erred in sustaining a decree enjoining the chief law enforcement officer of the State of Nebraska and other law enforcement officers acting under his advice and direction, from bringing criminal proceedings to secure a proper construction of a state statute, since judgment was on the pleadings, and it was nowhere admitted in the pleadings that property damage would be sustained by the respondent but, on the contrary, it appeared affirmatively that it was the intention of the Attorney General, if it should be determined by him to be necessary and proper so to do, to cause a test suit to be instituted in the Courts of the state for some one alleged violation of said statute, and cause such test suit to be prosecuted to effect in the highest Court of the state, and that the action of the Attorney General, when taken, would be taken solely in the interest of justice and so conducted as to cause a minimum of finan-

cial expense to the plaintiff until such final determination should be had. We insist that the failure of the Circuit Court of Appeals to consider this matter of equity jurisdiction in its original opinion, and its refusal to grant a petition for rehearing specifically challenging the question to its further consideration, constitutes error, and that it appears that the said Circuit Court of Appeals has erred (1) in deciding an important question of general law in a way untenable and in conflict with the weight of authority; (2) that it has erred in deciding a federal question (i. e., equity jurisdiction of the federal District Court) in a way in conflict with applicable decisions of this Court; and (3) that it has erred in so departing from the accepted and usual course of judicial proceedings, and so sanctioned such departure by the District Court from which the appeal was taken, as to call for an exercise of this Court's power of supervision.

ARGUMENT

There is no dispute as to the validity of the Nebraska Full Train Crew Law. Similar state laws have been sustained in this Court against constitutional attack.

Chicago, Rock Island and Pacific Railway Co. v. *Arkansas*, 219 U. S. 453.

St. Louis, Iron Mountain & Southern Railroad Co. v. *Arkansas*, 240 U. S. 518.

Missouri Pacific Railroad Co. v. *Norwood*, 283 U. S. 249.

The basis of respondent's Bill in Equity was (1) an alleged misconstruction of the act, and (2) threatened property damage which would result in irreparable injury to the respondent. This claimed basis for the interposition of equity was recognized by the Circuit Court of Appeals, in its opinion below wherein it said:

"A court of equity has no criminal jurisdiction, and as a general rule will not grant an injunction to stay criminal or quasi-criminal proceedings. It may, however, interpose for the protection of property rights, and if the injurious acts constituting an invasion of property rights will result in irreparable injury, then the court may grant an injunction to restrain the commencement of criminal proceedings based upon an unconstitutional or otherwise invalid statute, and such injunctive relief may be granted where the threatened prosecution is based upon a misinterpretation of a valid law if, at least as so interpreted, the statute would be unconstitutional. *Pennsylvania Company* v. *Stimson*, 223 U. S. 605; *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499; *Royal Baking Powder Co.* v. *Emerson* (CCA8) 270 Fed. 429; *Weyman-Brutton Co.* v. *Ladd* (CCA8) 231 Fed. 898; *Ross* v. *Goodwin* (D. C., N. H.) 40 Fed. (2d) 532; *Chambers* v. *Bachtel* (CCA5) 55 Fed. (2d) 851; *Stuart* v. *Utility Investing Corp.* (CCA3) 78 Fed. (2d) 279; *Truax* v. *Raich*, 239 U. S. 33; *Sterling* v. *Constantin*, 287 U. S. 378."

Both the District Court and the Circuit Court, however, fell into error in supposing that *threatened property damage* was admitted by the allegations and admissions of the pleadings. Reference is made to the decree of the District Court, from which appeal was taken (Record p. 28), wherein it is recited that the Court's finding was made "after a thorough examination of the pleadings, including the answer and the admissions therein." And, also, to the opinion of the Circuit Court of Appeals here challenged wherein it is stated as foundation of the factual basis of the opinion (Record p. 40), "it appears from the allegations and admissions in the pleadings." The following excerpts from the answer of the petitioners in the District Court clearly demonstrate that all allegations of property damage, or necessity for multiplicity of suits were traversed:

Page 21, paragraph 2:

(Defendants) "Deny that the defendants contemplate and threaten to wrongfully and unlawfully so administer the said statute as to impose on the plaintiff illegal financial burdens and exactions, and occasion a disruption and disorganization of part of plaintiff's passenger train operations."

Page 25, paragraph IX:

"Answering the allegations of paragraph IX of the petition, deny that the defendants under a (purposefully), arbitrary, wrongful and unlawful construction and administration of the above quoted statute are threatening to bring criminal proceedings against the plaintiff railroad company because of said alleged violations of said statute, or to take other steps to impose upon plaintiff, or upon interstate commerce, any illegal burdens and exactions which would result from a wrongful and unlawful construction and administration of said statute.

Defendants aver that the Nebraska State Railway Commission has no intention of proceeding any further in connection with any of the matters in the premises set forth, and that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation of its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:

(fol. 35) *The Attorney General of the State has under consideration the proper construction of said statute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be*

had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had."

So far from disclosing threatened damage to property or threatened multiplicity of suits, or any other ground upon which equity jurisdiction could attach, it is clearly disclosed by the pleadings *that there is not and never was a threat to invade respondent's property rights, nor a threat of multiplicity of suits by petitioners against respondent, nor any ground for the interposition of equity.* Under these circumstances there was no factual basis for any decree affording injunctive relief to the respondent.

Under these circumstances it is quite apparent that the District Court erred in entering judgment on the pleadings.

Judgment on the pleadings cannot be rendered for plaintiff where the allegations of the bill are sufficiently controverted or where the answer sets up a good defense.

49 C. J. 671.

Williams v. *Green*, 23 Fed. (2d) 796

Walker v. *Traylor Engineering, etc. Co.*, 12 Fed. (2d) 382.

Drew v. *U. S. Shipping Board Emergency Fleet Corp.*, 275 Fed. 620.

The District Court doubtless fell into this error by reason

of the fact that it had already passed upon a motion to dismiss in which it very properly assumed the facts alleged in the bill or petition in equity to be true. (Record pp. 16-19.)

In its decree (Record pp. 28-29), it erroneously assumed these same facts to be admitted by the answer and the Circuit Court of Appeals, as above quoted, fell into the same error.

It would seem unnecessary to argue at length that there must be a factual basis for equitable interposition before a federal District Court may interfere by injunction with the enforcement of state criminal statutes.

There have been a number of cases decided in the various Circuit Courts of Appeal wherein it has been held that a law enforcement officer may not be enjoined from enforcing a valid state enactment, even though he may be misconstruing the law.

Herkness v. *Irion*, 11 Fed. (2d) 386.

Amalgamated O. G. Corp. v. *City and County of San Francisco*, 263 Fed. 617.

Arbuckle v. *Blackburn*, 113 Fed. 616 (C. C. A. 6th Cir.), 191 U. S. 405.

Smith v. *Tillitson*, 29 Fed. (2d) 535 (C. C. A. 8th Cir.).

These cases were distinguished by the District Court (Record pp. 18 and 19) and the Circuit Court of Appeals (Record pp. 45, 46), on the authority of *Greene* v. *Louisville and I. R. Co.*, 244 U. S. 499, and *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, and it was considered that "a valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual."

Greene v. *Louisville and I. R. Co.*, 244 U. S. 499, 507.

The position of the Attorney General of Nebraska as the chief law officer of the state, with direction and control over the other law enforcement officers, will not, we think, be controverted. The sections of the Compiled Statutes of Nebraska for 1929, which define the power and authority of the State Attorney General in the administration of criminal laws of the state, are set out in the margin.*

Again we call attention to the fact that the answer in the District Court alleged:

> "Defendants aver * * * that none of the defendant law enforcement officers, aforesaid, have any intention to, or will act in any way to harass, coerce, impede or in any wise hinder the plaintiff in the operation if its railroad trains by reason of any alleged violation of said statute, save and except under the circumstances and conditions following, to-wit:
>
> (fol. 35) The Attorney General of the State has under consideration the proper construction of said stat-

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* Section 84-201 Compiled Statutes of Nebraska for 1929, is as follows:

> "There is hereby constituted an executive department to be known as the department of justice and the attorney-general shall be the head of this department."

Section 84-203 is as follows:

> "The attorney-general is hereby authorized to appear for the state and prosecute and defend in any court or before any officer, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interest * * *."

Section 84-204 is as follows:

> "The attorney-general and the department of justice shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties."

ute, and if it should be determined by him that it is necessary and proper so to do in order to obtain a judicial determination of the exact meaning thereof, he may cause a test suit to be instituted in the courts of the state for some one alleged violation thereof, and cause such test suit to be prosecuted to effect so that a determination of the Supreme Court of Nebraska may be had thereon; that it is not the object and purpose of the defendant Attorney General, nor will he seek by means of such test suit or action, to (inflect) financial penalties or loss upon the defendant prior to such time as it has been finally determined by orderly procedure in the courts of the state that the plaintiff is in fact committing acts which are violative of said statute, but that the action of the Attorney General, when taken, and of the law enforcement officers who may be called upon to assist him, will be taken solely in the interests of justice and so conducted as to cause a minimum of financial expense to the plaintiff until such final determination shall be had."

On oral argument before the Circuit Court of Appeals it was contended by the respondent that the intention of the law enforcement officers as to prosecution for penalties, was immaterial; that the statute in effect constituted a standing threat of invasion of property rights against which the complainant was entitled to be protected. The following is taken from a document entitled "Additional Authorities", filed by respondent in the Circuit Court of Appeals on the day of hearing, in support of this contention:

"*Atchison, Topeka & Santa Fe Ry. Co.* v. *La Prade.*, 2 F. Supp. 855.

This suit was instituted in the District Court to enjoin the Attorney General of the State of Arizona from enforcing what is styled the 'Arizona Train Limit Bill.' This Bill prohibited any railroad in Arizona from operating passenger trains consisting of more than seventy cars. The statute involved a penalty of not less

than $100.00 and not more than $1,000.00 for each offense.

In the opinion the Court said:

"* * * The Arizona statute involved herein imposes the duty on the Attorney General of the state, and him alone, to enforce the Train Limit Law. It is a continuing statutory duty devolving upon each succeeding Attorney General of the state. This duty is imposed upon Mr. La Prade as it was upon Mr. Peterson, and will continue to be inherited by each succeeding Attorney General as long as the act remains upon the statute books of Arizona. The plaintiff's cause of action, in so far as the same may depend upon the threatened injury, does not rest upon any expression of intent on the part of the defendant other than his oath of office, as the threat is contained in the language of the statute. When the defendant La Prade took the oath of office, it became his sworn duty to enforce the law. As long as there is an Attorney General in the state, the threat of prosecution is always present, and the injury, if any, resulting therefrom is always impending. *Commonwealth of Pennsylvania* v. *State of West Virginia (State of Ohio* v. *State of West Virginia)*, 262 U. S. 553, 43 S. Ct. 658, 57 L. Ed. 1117, 32 A. L. R. 300.'"

The holding in *Atchison, Topeka & Santa Fe Ry. Co.* v. *La Prade*, supra, was, however, set aside by this Court in the case of *Ex Parte La Prade*, 289 U. S. 444. The Court in its opinion, page 458, states:

"As shown above, the purpose of the suits was to prevent a wrong about to be committed by defendant acting outside, and in abuse of the powers of, his office. The wrongs threatened or committed by him constitute no ground for injunction against petitioner. Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general

is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it. * * *.'"

There was previously decided in the Circuit Court of Appeals, Eighth Circuit, a case which presents a somewhat analogous state of facts, to-wit: *Smith* v. *Tillitson*, 29 Fed. (2d) 535 (C. C. A. 8th Cir.). The Circuit Court of Appeals would have done well to have considered and followed the reasoning of that decision. In that case an injunction was sought to restrain the Attorney General and the law enforcement officers of ten counties and fifteen cities of the State of Kansas from seizing, confiscating, or in any wise interfering with the operation of complainant's vending machines. Kansas had enacted a law, constituting the operation of any machine or mechanism for gambling purposes, a misdemeanor. Complainant urged that his vending machines were not within the condemnation of the statute, and that the proposed enforcement thereof, by the defendant officers by seizure of his machines, would work irreparable injury to complainant's business in violation of the Constitution of the United States. The lower federal Court issued an interlocutory injunction from which an appeal was taken. The Circuit Court of Appeals, Eighth Circuit, reversed and remanded with directions to dismiss same, saying:

"The bill in this case is somewhat anomalous. It does not attack the validity of any Kansas statute against gaming or gambling devises. It does not plead the threat or imminence of arrest or prosecution, but asserts that the law officers of the state are about to seize and hold the property of complainant, presumably under the provisions of section 21-919, quoted above. That section provides for the arrest of the person or persons operating the gambling devices of which it

> treats, and therefore contemplates prosecution, and forms a part of the established criminal procedure of the state. It is undoubtedly true that, where state officers attempt to enforce an unconstitutional law, or exceed their authority in an attempt to enforce a valid law, where property rights will be destroyed, or seriously impaired, unlawful interference by criminal proceedings may be reached and controlled by a court of equity."

After citing the cases of *Arbuckle* v. *Blackburn*, 113 Fed. 616, 65 L. R. A. 864; *Consumers Co.* v. *Austin*, 238 Fed. 616; *Hoffman Brewing Co.* v. *McElligott*, 259 Fed. 525, and *Herkness* v. *Irion*, 11 Fed. (2d) 386, the court concluded:

> "The order of the trial court in terms enjoins the officers of the state from seizing, or in any way interfering with the operation of complainant's vending machines at any place within the state of Kansas. It is true that the order is a temporary one; but surely it cannot be supposed that upon final hearing the court would subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. In view of the debatable character of appellee's device, it is not to be anticipated that the defendants, or any of them, will resort to drastic measures, resulting in unnecessary injury to appellee's property and business in advance of determination of the question at issue in the courts of the state. The case is clearly one for their exclusive jurisdiction."

The only difference which can be discerned between the Tillitson case and the instant case, is that in the Tillitson case the Circuit Court of Appeals assumed that the law enforcement officers of Kansas would not act arbitrarily in seeking a construction of their gambling statute. That is, they would not resort to drastic measures, resulting in un-

necessary injury to property and business in advance of the determination of the question at issue in the Courts of the state.

In the instant case no such assumption was necessary. It is expressly pleaded that there will be no drastic action, nor attempt to impose heavy penalties, but that the only action contemplated is the possible bringing of a test case, which will be done solely in the interests of justice and so conducted as to cause a minimum of financial expense to the respondent.

We have been at some pains to conjecture on what possible theory this utter lack of factual basis for equity jurisdiction could have been overlooked by the Circuit Court of Appeals in its decision and utterly ignored when specifically challenged to its attention in the petition for rehearing. The point was included in the "Points to be Argued", set out in the Brief of Appellants below, and as pointed out in the petition for rehearing, was argued orally before the Circuit Court of Appeals. One of the cases relied on by adverse counsel at the argument has already been examined in this brief. There can be no question but what this point was challenged to the attention of the Circuit Court of Appeals. The only possible excuse for not considering the same, which occurs to our mind, is that while the question inhered as a necessary element in a proper consideration of the jurisdiction of the federal Court, it was not specifically stated as one of the points upon which the defendant intended to rely upon appeal (Record p. 33). The points include the following:

> "The statute is a valid enactment, not in conflict with any provision either of the state or the federal constitution, and equity does not afford jurisdiction to enjoin a threatened criminal prosecution, based on a valid

statute, because of an alleged misconstruction of such statute by administrative state officers." (Record p. 34)

We think this broad enough to permit the discussion, not only of the general rule, but of the exceptions thereto, and when and under what circumstances equity may assume jurisdiction to enjoin criminal proceedings under a valid statute.

It must, however, be kept in mind that this appeal was taken under the new rules of Civil Procedure for the District Courts of the United States, effective September 1, 1938. Reference to Rule 73, subdivision (b) discloses that no assignments of error need be filed in the District Court. Reference is made to the annotation on page 111 of the Annotated Rules as published by the West Publishing Company:

> "Note to Subdivision (b). No assignments of error need be filed in the district court, but see Rule 75 (d) (Statement of Points) for the service by the appellant of a statement of the points on which he intends to rely on the appeal. Compare the state provisions cited above. The provision regarding assignments of error contained in U. S. C., Title 28, sec. 862 (Removal of causes by former writ of error) as modified by U. S. C. Title 28, sec. 861a (Writ of error abolished; substitution of appeal) and sec. 861b (Statutes governing writs of error to apply to appeals) are superseded in so far as no assignments of error are required to be filed in the district court. Compare Rule 9 of the Supreme Court of the United States and the rules of the various circuit courts of appeals."

It is true that under Rule 75, subdivision (d) it is provided:

> "(d) STATEMENT OF POINTS. If the appellant does not designate for inclusion the complete record

> and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal."

But in this case no part of the proceedings or evidence were omitted and it would appear that it was necessary to file a statement of the points relied upon.

The rules of the United States Circuit Court of Appeals for the Eighth Circuit formerly contained as Rule 11 a provision for the assignment of errors on appeal to that Court, but this appears to have been omitted in their rules conforming to the new federal rules of civil procedure, effective September 16, 1938.

In any event, no excuse based on any such technicality was advanced by the Circuit Court of Appeals as ground for failure to consider this point. Further, it must be considered that here is a plain error going to the jurisdiction of the trial Court, which, even if not fully stated in the assignments of error (if such assignments are necessary) should not be deemed to be waived. In Hughes, Federal Practice, Jurisdiction and Procedure, vol. 8, page 254, paragraph 5743, it is said:

> "But an objection to the jurisdiction of the trial court is one that cannot be waived, and may be raised at any time, or considered by the appellate court on its own motion; hence it need not be presented by an assignment of error."

CONCLUSION

In conclusion we respectfully represent to the Court that an important question of general law has been wrongly decided; that an important federal question, to-wit: the jurisdiction of the federal District Court in an action against the chief law enforcement officer of the state has been wrongly decided and, in general, that the decision departs from the

accepted and usual course of judicial proceedings so as to require the exercise of the supervisory powers of this Court. We respectfully submit that this Court should not sanction the employment of the strong arm of injunction to prevent the State Attorney General from bringing a test action to obtain a construction of a valid criminal statute of the state, where no property damage is involved and no multiplicity of suits is threatened.

Respectfully submitted

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